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IN THE

Supreme Court of the United States

October Term, 1953

No. 634.

WILLIAM MITCHELL PATE,

Petitioner,

vs.

MYRTIS TRIMBLE STOUT,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

Opinions Below.

The opinions of the courts below are:

(1) Judgment of May 27, 1952, entered in the Superior Court of the State of California, in and for the County of Los Angeles [Clk. Tr. pp. 93-97];

(2) The judgment of October 19, 1953, of the District Court of Appeal of the State of California, Second Appellate District;

(3) The modification of the prior opinion in the District Court of Appeal of the State of California, Second Appellate District, Division Two, and the denial of a rehearing;

(4) The order of the Supreme Court of the State of California denying a hearing on the petition for hearing.

Jurisdiction.

The Supreme Court of the United States does not have jurisdiction because no federal question is involved; the "full faith and credit" clause (Art. IV, Sec. I) of the Federal Constitution is not applicable to proceedings prior to judgment. The California courts were not called upon to pay full faith and credit to a final judgment of Georgia but merely to yield to what appellant claimed, and respondent denied, constituted a prior pending suit in Georgia. Further, the decision of the California courts went upon an independent non-federal ground, as a matter of general principle of law and equity, *i. e.* that since appellant had appeared, answered to the merits, and participated in the trial of the California action, he had no standing to complain of its judgment.

Questions Presented.

Where a mother filed petition for custody of children in the Superior Court of California in and for the County of Los Angeles, her and the children's place of residence, and is awarded temporary custody but does not serve the summons and order to show cause upon the father because of his oral agreement to stipulate to a custody decree in California, and where the father thereafter surreptitiously removes the children from California to Georgia, and where the mother enters a habeas corpus action in Georgia for the purpose of regaining their physical custody in order to return them to California and proceed with her action already there entered, and where, being under no restraint from the courts of Georgia, she obtains the children and returns them to California, and where she subsequently serves her amended California complaint

upon the father and he appears therein, prays for judgment of the California court, and participates in the trial of the cause, and where after the California judgment in favor of the mother, the father obtains judgment of the Georgia court in a trial upon the habeas corpus action unsuccessfully sought to be dismissed by the mother, which Georgia trial she did not participate or appear in, is a federal question presented, *i. e.*, is the father denied "due process of law," or protection of the "full faith and credit" clause of the Constitution, by the California judgment?

Statute Involved.

28 U. S. C. A., Sec. 1257(3).

Statement of the Case.

Petitioner's Statement of the Case is inaccurate or incomplete in certain respects: Even under the original Georgia decree as modified, it was not clear that he had the right to take *both* children to his home in Georgia at the time he did so. [Rep. Tr. pp. 17-19.] Prior to such time he had come to California and been made aware of respondent's action just previously filed in the Superior Court of the State of California, in and for the County of Los Angeles, and of the fact she had been awarded temporary custody of the children. [Rep. Tr. pp. 34-38, 155-156.] After discussions with respondent, petitioner orally agreed to a custodial arrangement to be made the subject of a stipulated decree in the California action, for which reason he assured her she need not serve the summons and order upon him. [Rep. Tr. pp. 34-38, 40-41.] On this basis, he persuaded respondent to allow him the children overnight only; thereafter he flew with them to

the state of Georgia. [Rep. Tr. pp. 41-42.] Respondent then entered her habeas corpus action in Georgia for the purpose of obtaining the children, returning them to California and proceeding with her action already there filed. [Rep. Tr. p. 76.] The evidence does not show the respondent fraudulently obtained possession of the children in Georgia. [Rep. Tr. pp. 80-82.] She was under no restraint from the Georgia courts respecting the children. [Clk. Tr. pp. 58-66.] On September 29, 1951, respondent's amended California complaint was served upon petitioner in Georgia under order for service by publication. [Clk. Tr. p. 116.] Petitioner answered this complaint on October 26, 1951, on the merits, and prayed for judgment of the California court. [Clk. Tr. p. 9.] On May 5, 1951, trial upon respondent's complaint commenced and lasted two days, during which petitioner was represented by counsel and participated fully therein, after which judgment was rendered for respondent with rights of reasonable visitation in petitioner. [Rep. Tr. p. ....; Clk. Tr. p. 96.] Prior thereto, and at the time of her returning the children to California, respondent had sought unsuccessfully to dismiss her habeas action in Georgia. [Clk. Tr. p. 34.] At the time of entry of judgment in the California action, her right so to dismiss was still under consideration by the Georgia courts, and no final judgment had been entered in Georgia. Thereafter, in 1954, the Superior Court of DeKalb County entered its judgment for petitioner upon the habeas corpus action, in a hearing in which respondent neither participated nor appeared. [Record herein.] In order to protect her right to enforce the California judgment in the state of Georgia, respondent has petitioned to the Supreme Court of the United States for certiorari to the Supreme Court of Georgia in respect

of its affirmation of such judgment, appearing specially for that purpose. (Case No. 230, October Term, 1953.)

As appears from his reply brief filed in the District Court of Appeal of the State of California, Second Appellate District, Division Two, and from his petition for hearing in the Supreme Court of the State of California, petitioner expressly conceded the inherent jurisdiction of the California trial court to inquire into the matter of custody and support of resident children, despite prior adjudication of same by sister state. [Record herein.]

Argument.

Federal issues are not presented by questions decided by state courts on principles of general law or equity.

13 Cycl. Fed. Proc., Third Ed. 290;

Holden Land & Livestock Co. v. Interstate Trading Co., 233 U. S. 536, 58 L. Ed. 1083.

The matter of jurisdiction of state courts is such a question.

13 Cycl. Fed. Proc., Third Ed. 277, and cases cited.

An independent question not federal in character was decided by the California court, which is in itself broad enough to sustain the judgment.

Holley v. Lawrence, 317 U. S. 518, 87 L. Ed. 148;

13 Cycl. Fed. Proc., Third Ed. 286, and cases cited.

Here the California courts had jurisdiction of the person of petitioner, because by his answer on the merits he made himself a party to the action; this was essentially

the sole basis of the decision herein by the California Appellate Court.

Judson v. Superior Court, 21 Cal. 2d 11, 129 P. 2d 361;

Zobel v. Zobel, 151 Cal. 98, 90 Pac. 191.

It also had jurisdiction over his children because they were residing with respondent, a resident of California.

Sampsell v. Superior Court, 32 Cal. 2d 763, 779, 179 P. 2d 739.

See:

Titcomb v. Superior Court, 32 Cal. 2d 763, 769, 197 P. 2d 739.

"Having appeared and been heard" in the California action, the decree of the court of that state is binding upon him.

Lynde v. Lynde, 181 U. S. 183, 45 L. Ed. 810.

It is too clear to require extensive discussion that the "full faith and credit" clause of the Federal Constitution did not require the California court to step aside in the matter of litigating custody of children resident within its borders, merely because another action upon the same subject matter was *pending* in Georgia.

1 Am. Jur. 42-43, and cases cited.

The leading cases of this court upon the subject of the "full faith and credit" clause in such matters were all concerned with final judgments of sister states, as distinguished from proceedings *pending* therein.

May v. Anderson, 345 U. S. 539, 95 L. Ed. 1221;

New York ex rel. Halvey v. Halvey, 330 U. S. 610;

Williams v. North Carolina, 325 U. S. 226.

Even final judgment of a sister state cannot foreclose vindication by a forum of its own social policy, *Williams v. North Carolina, supra,* p. 230, *a fortiori* the mere pending of a like action in the sister state.

In any event, the original filing of respondent's petition, without service of process, gave that state prior jurisdiction; the opinion of the California Appellate Court does not hold otherwise.

Sampsell v. Superior Court, supra, 32 Cal. 2d 763, 776;

Harrington v. Superior Court, 194 Cal. 185, 192, ... Pac. .....;

In re Kosch, 105 Cal. App. 2d 418, ... P. 2d. .....;

Maloney v. Maloney, 67 Cal. App. 278, 280, 154 P. 2d 426.

Petitioner has no standing to question California's inherent jurisdiction to inquire into the matter of custody of children resident of the state, because of his waiver of such question in his reply brief in the California Appellate Court, and in his petition for hearing before the Supreme Court of California; any unnecessary decision upon this question by the state court would not make its decision reviewable.

13 Cycl. Fed. Proc., Third Ed. 242, 292, 510, and cases cited.

Conclusion.

For the foregoing reasons, this petition for writ of certiorari should be denied.

Respectfully submitted,

HUDSON P. HIBBARD,

Counsel for Respondent.